

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:08.07.2005

CORAM:

The Honourable Mr.MARKANDEY KATJU, CHIEF JUSTICE

and

The Honourable Mr.Justice F.M.IBRAHIM KALIFULLA

Writ Petition No. 29557 of 2003

Tvl.Opera Arts Industries
Rep. by its Proprietor R.M.Salam,
32, Sadayappa Maistry Street,
Chennai - 600 001.

... Petitioner

Vs.

1. The Registrar,
The Tamil Nadu Taxation Special Tribunal,
Singaravelar Maligai, Rajaji Salai,
Chennai - 600 001.

2. The Commercial Tax Officer,
Mannady (West) Assessment Circle,
191, NSC Bose Road,
Chennai - 600 001.

... Respondents

Petition filed under Article 226 of the Constitution of India
praying for the issue of a Writ of Certiorari calling for the records
of the first respondent in its order in TC(R) 137/1999 dt. 18.03.2002
and quash the same as illegal

For Petitioner

....

Mr.S.Ramanathan

For Respondent - 2

....

Mr.T.Ayyasamy
Special Govt. Pleader
(Taxes)

O R D E R

THE HONOURABLE THE CHIEF JUSTICE

This writ petition has been filed for a writ of certiorari for quashing the order of the Tamil Nadu Taxation Special Tribunal, Chennai dated 18.03.2002 in T.C (R) No.137 of 1999.

2. Heard the learned counsel for the parties, and perused the record.

3. The petitioner is a dealer in Elastic Rail Clips, which he manufactures and sells to the Railways. The elastic rail clip is a clip which holds together the sleeper and the rails in the track. The petitioner is a registered dealer under the Tamil Nadu General Sales Tax, and Central Sales Tax, and is an assessee on the file of the second respondent, the Commercial Tax Officer, Mannady (West) Assessment Circle, Chennai (hereinafter referred to as the C.T.O.).

4. For the assessment year 1995-96, the petitioner showed a total taxable turnover of Rs.22,94,775/- under the Tamil Nadu General Sales Tax Act (hereinafter referred to as 'the TNGST Act'). The petitioner reported the above turnover as taxable at 4% claiming the goods he sold to be forgings, and hence as declared goods falling under Entry 4(viii) of the Second Schedule to the TNGST Act.

5. The C.T.O. however called for the accounts of the petitioner and after verifying them observed that the Sillico Manganese Steel Rods purchased by the petitioner as raw material were subjected to various processes and then supplied to the Railways as a different commercial commodity viz., elastic rail clips. Hence the second respondent treated the above goods as falling under the general item under Entry 63 Part D of the First Schedule to the TNGST Act taxable at 8%. Since the goods were supplied to the Railways i.e. a Government Department, the second respondent levied tax at 4% but also levied 15% surcharge, 5% additional surcharge and additional sales tax at 1.5%. He also levied penalty of Rs.37,881/- under Section 12(3) (b) of the TNGST Act by order dated 20.3.1997.

6. Against that order, the petitioner filed an appeal before the Appellate Assistant Commissioner, II, Chennai disputing the levy of surcharge, additional surcharge, additional sales tax and penalty on the ground that the rail clips sold by the petitioner were

produced by a simple process of heat treating the special steel purchased by the petitioner and by bringing it into the shape of elastic rail clips by forging. Hence it was alleged by the petitioner that the railway clips sold by it were nothing but forgings and were hence declared goods under Entry 4(viii) of the Second Schedule to the TNGST Act, and liable to pay sales tax only at 4% but no surcharge, additional surcharge, additional sales tax or penalty were leviable as the goods were declared goods. The Appellate Assistant Commissioner by his order dated 21.7.97 partly allowed the appeal by deleting the penalty of Rs. 37,881/-, but he sustained the levy of surcharge, additional surcharge and additional sales tax by holding that forging is one that requires further finishing to make it a final manufactured product. He held that the Elastic Rail Clips sold by the petitioner do not require any further treatment for making it a final product, and they are themselves the final product.

7. Aggrieved, the petitioner filed a second appeal before the Sales Tax Appellate Tribunal, Chennai disputing the levy of surcharge, additional surcharge, and additional sales tax. Before the Tribunal the assessee contended that the product manufactured and sold by it was only a product of iron and steel, and the name 'elastic rail clip' is a misnomer. However, the Tribunal by its order dated 24.9.98 dismissed the appeal.

8. Against that order of the Appellate Tribunal, the petitioner filed a Tax Case Revision before Tamil Nadu Taxation Special Tribunal, Chennai. The petitioner mainly relied on the decision of the Larger Bench of CEGAT, New Delhi reported in *Sikka Heat Treatment Centre v. Collector of Central Excise, New Delhi, 1996 (81) E.L.T.628 (Tribunal)* in which the Tribunal has held that the rail clips are only forgings and not general goods. However, the Tamil Nadu Taxation Special Tribunal relied on the decision of the Supreme Court reported in *Vasantham Foundry v. Union of India, (Vol.99 STC 87)* and held that the Elastic Rail Clips supplied as a finished product to the railways as per its specifications and drawings after completion of polishing and machining could not be classified as declared goods.

9. Learned counsel for the petitioner contended that the first respondent had failed to consider that the petitioner had purchased Silico Manganese Steel Rods from other States and the manufacturing activity is nothing but twisting of the product into a required shape by heat treatment and of forging as specified by the Railways. The elastic clips holds together the sleeper and the rails in the railway track. There is no machining or polishing done in the above process.

Hence, it was contended that the finding of the first respondent was not correct.

10. Learned counsel for the petitioner contended that the lower authorities have treated the rail clips as finished product for the sole reason that there was a difference between raw materials and the end product of rail clips, but the lower authorities have failed to note that there was a change in the shape only by heat treatment and forging process while the materials have not lost its original character. It is alleged that the rail clips are only forgings as enumerated in Item 4 (viii) of the Second Schedule, and hence are declared goods. Hence it was contended that no surcharge, additional surcharge or additional sales tax is leviable.

11. The process of manufacture of rail clips as mentioned in the decision of the Larger Bench of the CEGAT in *Sikka Heat Treatment Centre Vs. Collector of Central Excise, New Delhi, 1996 (81) ELT 628* is as follows:-

"The manufacture of rail clips starts with iron/steel rods. These are first cut into required specific sizes of particular length. The cut pieces are then heated in a furnace to high temperature. The red hot iron rods are then bent on bending machines to give the required specific shape. The red hot pieces are forged in power press in the dies fitted in the press and are directly dipped in oil for quenching. Then the pieces are taken out of the oil and are tempered in an electrically heated tempering furnace to give strength. It is obvious from the foregoing that forging forms only one intermediate process in a chain of various processes".

12. The short question in this case is whether as contended by the learned counsel for the petitioner elastic rail clips sold by the petitioner to the railways can be regarded as declared goods falling under entry 4(viii) of the Second Schedule to the TNGST Act, 1959, which reads as follows:-

*" 4- Iron and steel, that is to say, -
(viii) discs, rings, forgings, and steel castings"*

13. The question therefore is whether elastic rail clips can be regarded as "forgings".

14. The learned counsel for the petitioner has relied on the aforesaid decision of the CEGAT in *Sikka Heat Treatment Centre Case*. In paragraph - 7 of that decision the Tribunal observed:-

".....having regard to the technical aspects, departmental understanding, and the precedent legal pronouncements on the subject, it is held that rail clips will not fall for classification under Item 68 CET as goods not elsewhere specified in the tariff, and it is further held that the rail clips, having regard to the process of manufacture involved, would be more appropriately classifiable under Item 26AA(ia)/25(8) CET as pieces roughly shaped for forging which is the classification determined for similarly manufactured forgings by the Tribunal in the *Aravali Forgings* decision (*supra*) and which is also the classification for such goods accepted by the Department in the instructions issued followed the Supreme Court decision in the *TISCO case* (*supra*)...."

15. The learned counsel for the petitioner submitted that the lower authorities have treated the rail clips as general goods because there was a difference between the raw-materials and end-product viz., rail clips. Since, a different commercial commodity has emerged the lower authorities held that it should be treated as the item falling under the general entry. The learned counsel for the petitioner further submitted that the lower authorities failed to note that there was change in shape only by heat treatment and forging process, and the materials had not lost its original character. Hence, it was contended that the rail clips sold by the petitioner are only forgings as enumerated in entry 4(viii) to the Second Schedule to the TNGST Act and are declared goods and hence no surcharge or additional surcharge or additional sales tax could be levied.

16. The learned counsel for the petitioner relied on the decision of the Supreme Court in *Tata Iron and Steel Co. Ltd. Vs. Union of India*, 1988 (35) ELT 605. The issue involved in that decision was whether the steel wheels, tyres and axles supplied by the appellant therein to the Railway were excisable under entry 26 AA as iron and steel products. The Supreme Court in that decision observed:-

"A perusal of these items makes it clear that forged steel products are liable to duty in terms of Tariff Item No.26AA. It is also beyond dispute that forged steel goods with which we are concerned would be covered by Tariff Item No.26AA(ia) which includes forged or extruded shapes and

sections, not otherwise specified. It is common ground that the appellant is liable to pay excise duty on the said goods under Tariff Item No.26AA(ia). The dispute in this connection is what is the stage at which the said goods could be said to be forged iron and steel products as contemplated in the said item; whether they could be regarded as such as soon as they are forged or after machining and polishing to remove the excess skin before being supplied to the Indian Railways. The stand of the appellant is that this machining and polishing which is done in its workshop, is not significant character and extensive precision machining and polishing has to be done by the railways at their workshop before the wheels, tyres and axles supplied by the appellant can be attached to the rolling stock. The machining and polishing done in the workshop of the appellant was only in the nature of shaping by removing the superficial material to bring the forged items up to with the Railways' specifications. A perusal of Item 26AA would show the excise duty on forged goods covered under the said entry, is according to the weight should be measured only after the polishing and machining at the appellant's workshop was completed. It is obvious that as a result of such machining and polishing there would be some loss in weight on account of excess skin removal. It was on the other hand contended on behalf of the Revenue, that the forging of the goods was complete before the machining and polishing was done to remove the excess surface or excess skin. It appears to us that the aforesaid contention of the appellant deserves to be accepted. Even to prepare forged goods for supplying to the railway, it was essential that the goods should comply with the railway's specifications and the excess steel on the surface or the excess skin as it is called, would have to be removed for that purpose. Moreover, as pointed out by the learned single Judge of the Delhi High Court, in *Metal Forgings Pvt. Ltd. & Another Vs. Union of India and Others*, 1985 (20) ELT 280 (paragraph - 12):-

"The process of manufacture of forged products consists of cutting of steel, pre-heating of material, heating and beating of steel material till final shaping is achieved. The steel forging process involves open forging and/or upset forging process under which the product is made with the help of dies. Thereafter, the extra/unwanted materials is removed by either trimming or by gas cutting or by skin cutting to achieve the shape and section nearest to the forged steel product required and also the forging clearances

specified in the standards by I.S.I. or International. It is conceded by the Government that forging would not cease to be forging by processes like removal of superfluous extra skin of cast iron.

The learned Judge has further pointed out in the next paragraph of the said judgment that the removal of extra/unwanted surface steel by either trimming or by gas cutting or by skin cutting of the forged products must be regarded as incidental or ancillary to the process of manufacture. This view is also consisted with the definition given to the term "manufacture" contained in sub-Section (f) of Section 2 of the Central Excise and Salt Act, 1944. This definition shows that the manufacture includes any process incidental or ancillary to the completion of a manufactured product. We are, therefore, of the view that in respect of the said goods the weight for the purpose of levy of excise duty under Item 26AA(ia) should be taken after the machining and polishing is done to remove the excess surface skin and the contention of the appellant in this regard must be accepted".

17. The learned counsel for the petitioner also relied on the following observation of the CEGAT in Sikka Heat Treatment Centre Case (supra):-

"Having regard to the technical aspects, departmental understanding, and the precedent legal pronouncements on the subject, it is held that the rail clips will not fall for classification under Item 68 CET as goods not elsewhere specified in the tariff, and it is further held that the rail clips, having regard to the process of manufacture involved, would be more appropriately classifiable under Item 26AA(ia)/25(8) CET as pieces roughly shaped by forging".

18. Thus, according to the CEGAT the rail clips supplied by the petitioner to the railways are classifiable as pieces roughly shaped by forgings. Hence, it is contended by the petitioner that the rail clips supplied by the petitioner are only forgings, and hence taxable under entry 4(viii) of the Second Schedule to the TNGST Act as declared goods.

19. On the other hand, learned counsel for the department has submitted that assessee purchases silico manganese steel rods and manufactures the elastic rail clips after various processes. The goods sold by the assessee were an altogether different commodity from its raw materials. Hence they would fall under the residual entry/item 63 of Part D of the First Schedule to the TNGST Act.

20. It may be noted that under Section 14(iv)(viii) of the Central Sales Tax Act discs, rings, forgings and steel castings have been declared to be goods of special importance in inter-state trade or commerce. Consequently, the restrictions imposed by Section 15 of the Act are applicable on the aforesaid declared goods.

21. Under Article 286(3) of the Constitution parliament is empowered in relation to goods declared to be of special importance in inter-state trade or commerce to lay down restrictions and conditions subject to which any State law may regulate the tax on sales or purchase of such declared goods in the State. Accordingly, Section 14 of the Central Sales Tax Act declares a number of goods as goods of special importance in inter-state trade or commerce, and Section 15 places certain restrictions on the tax payable on sale or purchase of declared goods. One of the restrictions imposed by Section 15 is that the tax payable under the State Sales Tax Act in respect of any sale or purchase of such declared goods shall not exceed 4% of the sale or purchase price thereof.

22. The contention of the petitioner is that the elastic rail clips sold by it to the railways falls under Section 14(iv)(viii) of the Central Sales Tax Act, and hence sales tax, surcharge, additional surcharge put together should not exceed 4%.

23. The assessee purchases Silica Manganese Steel Rods out of which elastic rail clips are manufactured and sold to the Railways. These elastic rail clips are used for holding together the sleeper and the rails on the railway track. The steel rods purchased by the assessee are cut into the required sizes, heat treated, forged, dipped in oil for quenching, and twisted to manufacture the railway clips according to the specifications of the railways. The elastic rail clip is "S" shaped and various processes are involved to manufacture it.

24. In our opinion, this entire process by which the steel rod is converted into elastic rail clips cannot be called forging. We are of the opinion that though forging may form only one intermediate process, the entire chain of various processes involved in the

manufacture of elastic rail clips cannot be called forging. An elastic rail clip is a separate distinct commodity known in the trade circle, and hence it cannot be classified as "forging".

25. As pointed out by the Supreme Court in the case of *Rajasthan Roller Flour Mills Association Vs. State of Rajasthan*, (1993) 91 STC 408 "the provisions of Section 14 and 15 of the Act being restrictions upon the plenary powers of the State legislature to levy tax on the sale/purchase of goods must be construed strictly. In other words, the restrictions must be limited to the goods expressly mentioned and nothing more must be read into it except what it says clearly". In the aforesaid decision the Supreme Court, held that when wheat is consumed for producing flour (atta) or maida or suji, the commodities obtained are different commodities from wheat and they are different goods commercially speaking, and hence not declared goods. Likewise, rail clips manufactured from steel rods through various processes including forging cannot be treated as declared goods.

26. In the case of *Vasantham Foundry Vs. Union of India*, (1995) 99 STC 87, a three Judges Bench of the Supreme Court had occasion to consider whether "cast iron casting" is declared goods falling under Section 14 of the Act. The Court held:-

"Therefore, in our view, "cast iron casting" in its basic or rough form must be held to be "cast iron". But, if thereafter any machining or polishing or any other process is done to the rough cast iron casting to produce things like pipes, man-hole covers or bends, these cannot be regarded as "cast iron casting" in its primary or rough form, but products made out of cast iron castings. Such products cannot be regarded as "cast iron" and cannot be treated as "declared goods" under Section 14(iv) of the Central Sales Tax Act". सत्यमेव जयते

27. In our opinion, what has been stated by the Supreme Court about cast iron castings is applicable *mutatis mutandis* to forging as well. Hence, elastic rail clips which was manufactured by the petitioner from steel rods and supplied to the railways as a final product cannot be characterised as forging.

28. In our opinion, the reliance placed on the decision of the CEGAT in *Sikka Heat Treatment Centre Case (supra)* is misconceived. In that case the Tribunal for the purpose of levy of excise duty held that elastic rail clips should be considered as "pieces roughly

shaped by forging", one of the items enumerated under item 26 AA(ia)/25(8) of CET. It is pertinent to note that under item 26 AA(ia)/25(8) various products were enumerated and the Tribunal found the elastic rail clips as answering the description of "*pieces roughly shaped by forging*". In our opinion, the decision of the CEGAT cannot be extended to a sales tax law wherein the object is not to tax the substance but to tax the products manufactured out of the substance, vide *State of Tamil Nadu Vs. Pyarelal Malhotra*, AIR 1976 SC 800. At any event we are not in agreement with the view taken by the CEGAT in the aforesaid decision.

29. The decision of the Supreme Court in the case of *Tata Iron and Steel Company Limited Vs. Union of India*, 1988 (35) ELT 605 SC also does not help the assessee. The Supreme Court in that case found that the product supplied by the manufacturer therein, namely, wheels and axles required further processing at the hands of the railways to make them final products. Hence, the ratio of that decision is not applicable to the present case, where the final manufactured product sold to the Southern Railways was in ready to use condition without any need for further processing. It is pertinent to note that in Section 14 of the Act, "*forgings*", vide Clause (viii), and "*wheels and axles*", vide Clause (xiv) are shown in two different entries, thereby making it abundantly clear that "*forgings*" in its basic form and the final forged products such as wheels, axles, etc., are different commercial commodities for the purposes of sales tax.

30. It may also be mentioned that the decision of the Supreme Court in the case of *Tata Iron and Steel Company* (*supra*) was considered by a three Judges Bench of the Supreme Court in the case of *Pefco Foundry Chemicals Ltd. Vs. Collector of Central Excise, Pune*, 1993 Supp. (1) SCC 74. In that case, the Supreme Court found that the decision in *Tata Iron and Steel Company Case* (*supra*) was rendered on the basis of an admission made by the railways that what was supplied was in rough machined or forged condition. The Court held that "*Cylinder liner*" manufactured by the manufacturer out of iron casting was not mere iron casting and it was identifiable as a machine part. Hence, the decision in *Tata Iron and Steel Company Case* (*supra*) does not help the assessee. Hence, in our opinion, elastic rail clip manufactured and sold by the assessee cannot be considered as a "*declared goods*".

31. In view of the above, there is no force in this writ petition, and it is accordingly dismissed. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

Pv/sm

Copy to:-

1. The Registrar,

The Tamil Nadu Taxation Special Tribunal,
Singaravelar Maligai, Rajaji Salai,
Chennai - 600 001.

2. The Commercial Tax Officer,

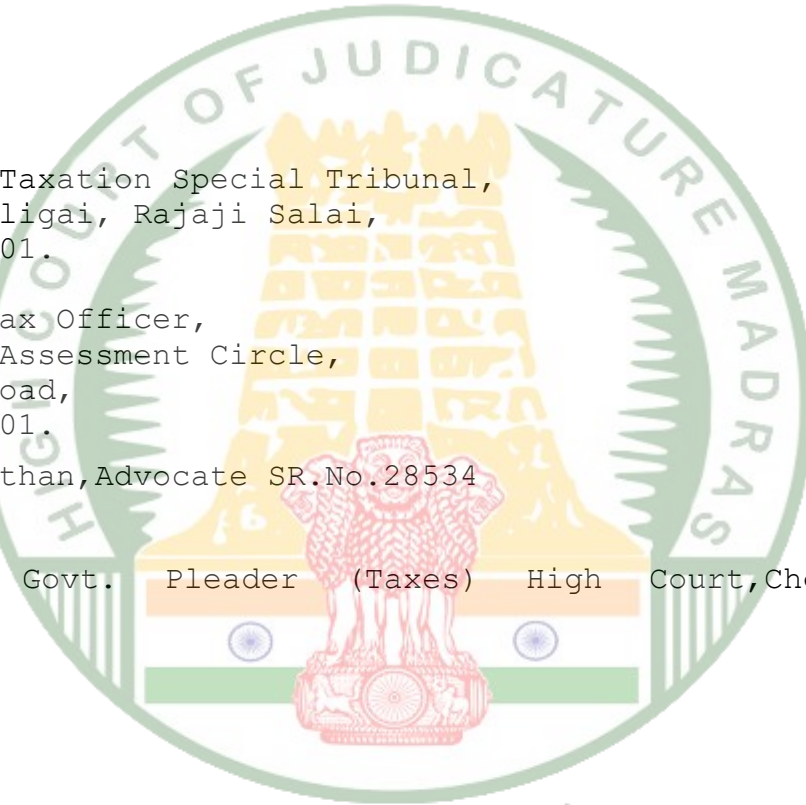
Mannady (West) Assessment Circle,
191, NSC Bose Road,
Chennai - 600 001.

+1cc to Mr.S.Ramanathan, Advocate SR.No.28534

+1cc to Special Govt. Pleader (Taxes) High Court, Chennai-104
SR.No.28437

LA (CO)

kaa 28.07



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Pre-Delivery Judgment

in

W.P.No.29557 of 2003

08.07.2005.

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